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Supreme Court of the United States

OCTOBER TERM, 1935

No. 663

WHEELING STEEL CORPORATION, *Appellant*,

v.

FRED L. FOX, STATE TAX COMMISSIONER OF WEST VIRGINIA, AND KARL G. SAILER, ASSESSOR OF OHIO COUNTY, WEST VIRGINIA, *Appellees*.

BRIEF OF APPELLEES
and
APPENDIX

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FRED L. FOX, STATE TAX COMMISSIONER OF WEST VIRGINIA, AND KARL G. SAILER, ASSESSOR OF OHIO COUNTY, WEST VIRGINIA, *Appellees.*

BRIEF OF APPELLEES

OPINIONS BELOW

The references to the opinions below given in the appellant's brief are correct. The opinion of the Supreme Court of Appeals of West Virginia is reported in 115 W. Va. 553, 177 S. E. 535 *(In re Wheeling Steel Corporation Assessment).*

JURISDICTION

The appellant has filed a statement as to jurisdiction required by Rule 12, Paragraph 1, of this Court, and probable jurisdiction was noted on January 20, 1936.

STATEMENT OF THE CASE

This case involves an *ad valorem* property tax upon intangible personal property of the appellant, Wheeling

Steel Corporation, consisting of money on deposit in bank and accounts receivable. The case does not involve an income, inheritance, or privilege tax.

The history of the case is sufficiently stated in the "Statement of the Case" of appellant's brief.

From the stipulation of facts entered into by counsel in lieu of the taking of evidence, the following material statements are found:

> "The Wheeling Steel Corporation maintains its principal office in Delaware through the Corporation Service Company, a corporation, as permitted and required by the laws of Delaware. The principal office maintains a duplicate stock ledger and records of all transactions with reference to petitioner's capital stock. The originals of such ledger and records are kept in New York City. The Wheeling Steel Corporation does not have any individual office building or suite of offices in the State of Delaware, but maintains such an office as is required by Delaware laws for corporations organized in that State. Petitioner, Wheeling Steel Corporation, files such reports and pays such franchise taxes as are required by the State of Delaware to be filed and paid by a corporation organized and existing under the laws of that State.
>
> "The Wheeling Steel Corporation's general business offices are located in Wheeling, Ohio County, West Virginia, and it maintains sales offices in Atlanta, Georgia; Buffalo, New York; Cincinnati, Ohio; Detroit, Michigan; New Orleans, Louisiana; Philadelphia, Pennsylvania; San Francisco, California; Boston, Massachusetts; Chicago, Illinois; Dallas, Texas; Los Angeles, California; St. Louis, Missouri; Seattle, Washington, and New York City.

"The Wheeling Steel Corporation's general books and accounting records are kept at the Wheeling office. Plant offices maintain original detailed accounting records showing (a) materials received, (b) railroad cars received and shipped, (c) detailed labor costs, (d) production and shipments, (e) detailed stocks of goods and (f) payrolls. Employment offices are maintained at each plant.

"Sales contracts are negotiated and orders are taken by the various sales offices subject to acceptance or rejection at Wheeling.

"The Portsmouth, Ohio, plant makes up and mails out invoices for all products shipped from that plant, together with bills of lading and shipping notices. All other plants prepare complete invoices with exception of information with reference to the price of material described therein. The latter invoices are then forwarded to Wheeling where they are completed and mailed to the customer. Bills of lading and shipping notices are, however, mailed to customers from the individual plants. All invoices are payable in Wheeling.

"The majority of commercial accounts are paid by check issued in Wheeling. Payrolls are made up and payroll checks are prepared and signed at the various plants and are distributed to the employees by the respective plants. Such checks are paid with funds on deposit in banks in localities where the plants are situated.

"Under the law of Delaware, stockholders' and directors' meetings of Delaware corporations may be held within or without the State of Delaware; meetings of directors and stockholders of the Wheeling Steel Corporation are held in Wheeling. Such meetings are held in conformity with the laws of Delaware.

"The Chairman of the Board, President, Treasurer, Secretary and Chief Counsel reside at Wheeling. Local counsel are retained in the cities in Ohio in which the principal plants are located.

"The capital stock is transferable in both New York City and Wheeling, but is registerable only at the office of the Registrar in New York City. Capital stock records are maintained in New York City and at the Wheeling Steel Corporation's Delaware office.

"Dividends, when declared, are ordered to be paid and distributed at meetings held at Wheeling, although the checks are drawn and distributed by the Dividend Disbursing Agent located in New York City, and are paid with funds on deposit in banks in New York City.

"The petitioner, Wheeling Steel Corporation, owns a twelve-story office building situated in Wheeling, approximately forty-three (43) per cent of which is occupied by officers and office employees of the Petitioner." (R. 3-5.)

An additional stipulation of facts was entered into after the decision of the Supreme Court of Appeals of West Virginia and prior to the final disposition of the case by the Circuit Court of Ohio County, West Virginia, from which the additional facts appear:

"1. That the taxpayer was assessed by the State of Ohio on account of intangibles in the amount only of Two Hundred Fifty Thousand One Hundred Thirty-three Dollars and Forty-two Cents ($250,133.42).

"2. That when the review by the Tax Commissioner of the assessment of taxpayer's intangibles, as made by the Assessor of Ohio County, was made, neither the Assessor nor the State Tax

Commissioner was advised that Two Hundred Fifty Thousand One Hundred Thirty-three Dollars and Forty-two Cents ($250,133.42) of such intangibles had been assessed and the tax thereon paid in the State of Ohio.

"3. That no states other than Ohio and West Virginia have assessed taxpayer upon any of its intangibles for the year 1933.

"4. That the money on deposit in banks outside the State of West Virginia on the first day of January, 1933, had been deposited in such banks by taxpayer by sending from taxpayer's Wheeling, West Virginia, office to such banks the original checks or drafts received by taxpayer from its customers in payment for the purchase of materials, manufactured and sold by taxpayer, such checks having not first been deposited in West Virginia banks." (R. 70-71.)

• • •

"8. Of the moneys expended for payrolls, materials, new equipment, maintenance, operating expenses, and the conduct of the business in Ohio and states other than West Virginia, the moneys are expended by executive action taken at Wheeling and by the drawing of checks or drafts at Wheeling, except in connection with the payment of payrolls at its Portsmouth, Ohio, and Steubenville, Ohio, plants where payroll checks or orders are drawn, but drawn against moneys sent to banks at such points for the express purpose of meeting the payrolls and for incidental items as they arise. All moneys are controlled and the expenditures directed by the Wheeling office, and if the immediate expenditure be made elsewhere, such immediate expenditure is made only under

specific or general direction and control of the Wheeling office." (R. 71-72.)

Appellant has qualified to do business as a foreign corporation in West Virginia, Ohio, and Minnesota (R. 2).

Additional West Virginia Statutes Involved

In addition to the West Virginia statutes referred to by appellant, and set forth in the appendix to appellant's brief, the following West Virginia statutes are material and informative:

Section 4, Article 5, Chapter 40, Acts of the Legislature of West Virginia, Regular Session, 1933, relating to "In what district personalty is assessed".

Section 2, Article 5, Chapter 40, Acts of 1933, Regular Session.

(The foregoing sections are amendatory of Article 5, Chapter 11, of the Official Code of 1931.)

Section 2, Article 3, Chapter 11 of said Official Code, relating to "Lists of property for assessment purposes."

Section 4, Article 3, Chapter 11, relating to "Oath of Owner."

Section 6, Article 5, Chapter 11 of the Official Code of West Virginia, 1931, relating to the "Deduction of Indebtedness" in the assessment of intangibles, which was repealed by omission by Chapter 40 of the Acts of the Legislature of West Virginia, Regular Session, 1933, but which is presented herewith for the purpose of showing the meaning of the word "persons" as used in the tax statutes of West Virginia.

Section 11, Article 6, Chapter 11, relating to entry of public utility assessment.

Section 10, Article 2, Chapter 2 of the Official Code of West Virginia, relating to definitions, and particularly defining "person" as used in said Code.

Copies of said statutes, except the last mentioned, are set forth in the Appendix hereto.

SUMMARY OF ARGUMENT

I.

The accounts receivable and money on deposit of Wheeling Steel Corporation involved in this case have a taxable situs in West Virginia.

In re Wheeling Steel Corp. Assessment, 115 W. Va. 553; 177 S. E. 535;

Miami Coal Co. v. *Fox, Treasurer,* 203 Ind. 99; 176 N. E. 11; 79 A. L. R. 333;

New Orleans v. *Stempel,* 175 U. S. 309;

Bristol v. *Washington County,* 177 U. S. 133;

Board of Assessors v. *Comptoir National D'Escompte de Paris,* 191 U. S. 388;

Metropolitan Life Insurance Company v. *New Orleans,* 205 U. S. 395;

Liverpool L. & G. Insurance Company v. *Board of Assessors,* 221 U. S. 346;

Virginia v. *Imperial Coal Sales Company,* 293 U. S. 15;

Safe Deposit & Trust Company v. *Virginia,* 280 U. S. 83;

Commonwealth v. *United Cigarette Machine Company,* 119 Va. 447; 89 S. E. 935;

Bemis Brothers Bag Company v. *Louisiana Tax Commission,* 158 La. 1; 103 So. 337;

Buck v. *Miller,* 147 Ind. 586; 45 N. E. 647;

Higgins v. *Commonwealth,* 126 Ky. 211; 103 S. W. 306;

Finch v. *York County,* 19 Neb. 50; 26 N. W. 589.

II.

The statutes of West Virginia under which appellant's intangible property was assessed, as interpreted by the State Courts, are not in violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution when considered in connection with the statutes relating to the assessment of like property of either natural persons or public utility corporations.

Section 1, Article 5, Chapter 11 of the Code of West Virginia, as amended by Chapter 40, Acts of the Legislature of West Virginia, Regular Session, 1933 (Appellant's Brief, Appendix, p. 55).

Section 12, Article 3, Chapter 11 of the Code of West Virginia, amended by Chapter 38, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933 (Appellant's Brief, Appendix, p. 50).

Section 13, Article 3, Chapter 11 of the Code of West Virginia (Appellant's Brief, Appendix, p. 52).

Section 2, Article 3, Chapter 11, Code of West Virginia (Appendix herewith, p. 1).

Section 4, Article 3, Chapter 11, Code of West Virginia (Appendix herewith, p. 2).

Section 2, Article 6, Chapter 11, Code of West Virginia (Appellant's Brief, Appendix, pp. 59-61).

Section 11, Article 6, Chapter 11, Official Code of West Virginia (Appendix herewith, p. 6).

Section 15, Article 3, Chapter 11, Code of West Virginia, amended by Chapter 40, Acts of the Legislature, Regular Session, 1933 (Appellant's Brief, Appendix, p. 53).

Section 2, Article 5, Chapter 40, Acts of the Legislature, Regular Session, 1933 (Appendix herewith, p. 3).

Section 4, Article 5, Chapter 40, Acts of the Legislature, Regular Session, 1933 (Appendix herewith, p. 4).

Section 10, Article 2, Chapter 2, Official Code of West Virginia.

Section 6, Article 5, Chapter 11, Official Code of West Virginia (Appendix herewith, p. 5).

ARGUMENT

I.

THE ACCOUNTS RECEIVABLE AND MONEY ON DEPOSIT OF WHEELING STEEL CORPORATION INVOLVED IN THIS CASE HAVE A TAXABLE SITUS IN WEST VIRGINIA.

It is readily agreed that a state may not tax property over which it has no jurisdiction. Stated otherwise, a state may not tax property which does not have a taxable situs within its territorial limits. Should a state collect *ad valorem* taxes from a person or corporation with respect to property which does not have a taxable situs within the state, such person or corporation would be deprived of property without due process of law.

Likewise, we expressly say that we do not regard the State of West Virginia as a residuary legatee, so to

speak, with respect to taxation, or claim that the State of West Virginia may tax the intangible property here involved merely because the record does not show such intangible property to be taxed elsewhere.

We also agree with counsel for appellant, and in fact assert, that, generally, the taxable situs of accounts receivable and of money in bank is at the domicile of the owner, (*Baldwin* v. *Missouri*, 281 U. S. 586, 591; *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1, 8.)

However, accounts receivable and money on deposit in banks may acquire a situs for purposes of taxation at some place other than the technical domicile of the owner. (See cases cited under Point I, Summary of Argument, pages 7-8 herein.)

Our position in this case is that the accounts receivable and bank deposits of Wheeling Steel Corporation have acquired a taxable situs in West Virginia, and that they have no taxable situs in Delaware, the technical domicile of the corporation, and that the record does not show the acquisition of a taxable situs in any other state by any part of said intangibles, though we have not assigned cross error to the judgment of the Supreme Court of Appeals of West Virginia in deducting $250,133.42 from the assessment as originally approved by the tax commissioner, upon the mere showing that said amount had been assessed in the State of Ohio.

When intangibles acquire a situs for taxation at a place other than the technical domicile of the owner it is said that they have acquired a "business situs" as distinguished from a domiciliary situs. In the case of *Commonwealth* v. *United Cigarette Machine Company*, 119 Va. 447, 89 S. E. 935, 939-40, what is commonly referred to as a "business situs" is designated a "commercial domicile," which phrase, we believe, quite aptly describes the situation.

The cases cited above under Point I of Summary of Argument and relating to business situs, with the exception of the case of *Miami Coal Company* v. *Fox, Treasurer,* 203 Ind. 99, 176 N. E. 11, have ordinarily dealt with situations in which the principal business of the person or corporation has been conducted in fact in the state of the technical domicile of the owner, but a branch or part of such business has been relatively permanently established and conducted in some other state in such a manner as to permit its reasonable separation and identification from the other general business of the person or corporation and has been conducted by an agent or representative. It is characterized essentially by a localized management and control, which gives the activities such a character as they would have if they were in fact conducted in the state of business situs by a resident corporation or individual. (See *Bristol* v. *Washington County,* 177 U. S. 133, 143-4; *Metropolitan Life Insurance Company* v. *New Orleans,* 205 U. S. 395, 402; *Liverpool L. & G. Insurance Company* v. *Board of Assessors,* 221 U. S. 346, 356-7.)

Our position here is that just as a part of the business of an individual or of a corporation may be localized in a state other than that of the technical domicile, so may all of such business become so localized if in fact the corporation is not doing business and is not managing and controlling its assets and operations in the state of its technical domicile, but is, in fact, managing, keeping, and controlling its assets and business in another state. In other words, what may be true of a part may also be true of the whole.

Here Wheeling Steel Corporation has not merely localized a part of its business in West Virginia through

the activities of an agent, but has localized its entire fiscal management in West Virginia through its principals.

Counsel for appellant (Br. 13) say that the Supreme Court of Appeals of West Virginia concluded that, "its (appellant's) entire business had been localized in West Virginia * * *." We do not believe that the language of the Supreme Court of Appeals of West Virginia goes quite that far, and we do not believe that it is necessary for the Court to go so far in order to sustain the position of the appellees. All of the manufacturing business of appellant has not been so localized in West Virginia, but it is believed that it is sufficient for the purposes of *ad valorem* property taxes upon the intangibles of appellant that the business of keeping, managing and controlling all of such intangibles has been localized in West Virginia. This, we believe, the record here shows.

The theory that intangible personal property can be taxed only when related to the taxation of real estate or tangible personal property was rejected by this Court in the case of *Virginia* v. *Imperial Coal Sales Company*, 293 U. S. 15, 20.

In appellant's brief the position is frequently asserted that the intangibles of appellant were not derived entirely from manufacturing activities within the State of West Virginia. This is true, and were we considering an income tax, such position might be material. But we are not considering an income tax, but an *ad valorem* property tax upon intangible property. The source of the property is not determinative. That which is determinative, is the situs of the intangible property on the assessment date. West Virginia, of course, cannot tax the personal property, iron and steel, manufactured by appellant and located in the State of Ohio. Obviously,

however, if such iron and steel were removed from Ohio to West Virginia, West Virginia could then tax it as tangible personal property, and the source from which it was obtained by Wheeling Steel Corporation would not be material. Likewise, if the iron and steel be not removed to West Virginia, but be exchanged for money or accounts receivable, and in the course of the transaction such money or accounts receivable be transferred to West Virginia, then West Virginia may impose an *ad valorem* property tax upon such intangibles just as though the State might have imposed such a tax upon the tangible iron and steel had it been removed into the State of West Virginia.

It is believed that the decisions of this Court establish beyond any question the principle of business situs or commercial domicile of intangible property for purposes of *ad valorem* property taxation. (*New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; *Board of Assessors* v. *Comptoir National D'Escompte de Paris*, 191 U. S. 388; *Metropolitan Life Insurance Company* v. *New Orleans*, 205 U. S. 395; *Liverpool L. & G. Insurance Company* v. *Board of Assessors*, 221 U. S. 346.)

It is significant to note that in the cases of *Baldwin* v. *Missouri*, 281 U. S. 586, 593; *Farmers Loan & Trust Company* v. *Minnesota*, 280 U. S. 204, 213; *First National Bank of Boston* v. *Maine*, 284 U. S. 312, 330; and *Biedler* v. *South Carolina Tax Commission*, 282 U. S. 1, 9, in each of which cases an inheritance tax was involved, and it was held that the inheritance tax could not be imposed upon the particular intangibles involved by a state other than that of the technical domicile of the owner, the Court was careful to point out that the intangible personal property involved had not acquired a business situs in the state which sought to impose the taxes.

By way of illustration is was observed in the case of the *First National Bank* v. *Maine,* 284 U. S. 312, 331:

> "We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property. See Farmers Loan & T. Co. Case, supra (280 U. S. 213, 74 L. ed. 375, 65 A. L. R. 1000, 50 S. Ct. 98). That question heretofore has been reserved, and it still is reserved to be disposed of when, if ever, it properly shall be presented for our consideration."

However, it would seem that this is the first time there has been presented to this Court a case in which the corporation transacts no business whatever within the state of its technical domicile, but, to the contrary, transacts all of its commercial activities in some other state. In view of the extended modern practice of effecting incorporation in one state for the express purpose of transacting business in another state as a foreign corporation, it may be rather surprising that such a case has not heretofore been presented to this Court, but an extended review of the decisions has not lead us to any case considered by this Court involving a state of facts entirely analogous to that here presented.

The case of *Miami Coal Company* v. *Fox,* 203 Ind. 99, 176 N. E. 11, presents with exactness, but in the converse, our position here.

In the *Miami* case the company was an Indiana corporation. Indiana was its domicile. In Indiana it operated coal mines and all of its intangibles resulted from the mining of coal in Indiana. However, its coal was sold from Illinois and its financial affairs were managed and controlled in Illinois. It was held by the Supreme

Court of Indiana that the intangibles of the Miami Company had no taxable situs in Indiana but that the taxable situs was in Illinois.

In the case at bar not all of the iron and steel of appellant is manufactured in Ohio; approximately twenty-four percent is manufactured in West Virginia (R. 7). But forgetting, for purposes of argument, the production in West Virginia, and assuming that all of the iron and steel of the appellant, the sale of which resulted in its money and intangibles, was produced in Ohio, it is sold from Wheeling, West Virginia (R. 4), and collections are made at Wheeling (R. 4); all financial management is in Wheeling (R. 4). Certainly, upon the authority of the *Miami* case the taxable situs of the intangible property of appellant is in West Virginia and not in Ohio.

While it is sometimes stated that intangibles have no situs, it is not believed that such statement is intended to be accepted literally, but that it is meant that they have no physical situs susceptible of observation, as has real estate or tangible personal property. *(First National Bank of Boston* v. *Maine,* 284 U. S. 312, 328.) Intangibles do have a place of being which may be called a taxable situs. If they have a being or existence, which they, of course, have, they must exist somewhere. We believe their existence and taxable situs is at the place where they are owned, managed, and controlled. *(Liverpool L. & G. Insurance Company* v. *Board of Assessors,* 221 U. S. 346, 356; *Virginia* v. *Imperial Coal Sales Company,* 293 U. S. 15, 19; *Safe Deposit & Trust Company* v. *Virginia,* 280 U. S. 83, 92.)

Can it be said that the intangibles of appellant have any existence, being, or taxable situs in Delaware, the state of appellant's technical domicile, or domicile of origin? Certainly, the intangibles have no situs in Delaware under the authority of the *Miami* case.

The rule that the taxable situs of intangibles is at the technical domicile of the owner is but a mere fiction, and will not be followed when the facts are clear that the intangible property has a situs elsewhere. Thus, in the case of *Bristol* v. *Washington County,* 177 U. S. 133, 141, it was observed:

> "For many purposes the domicil of the owner is deemed the situs of his personal property. This, however, is only a fiction, from motives of convenience, and is not of universal application, but yields to the actual situs of the property when justice requires that it should. It is not allowed to be controlling in matters of taxation. Thus, corporeal personal property is conceded to be taxable at the place where it is actually situated. A credit, which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its situs where it is owned,—at the domicil of the creditor. The creditor, however, may give it a business situs elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view to reloaning the money and keeping it invested as a permanent business."

See also *State Board of Assessors* v. *Comptoir National, etc.,* 191 U. S. 388, 404; *Safe Deposit & Trust Company* v. *Virginia,* 280 U. S. 83, 92.

In the case of *Virginia* v. *Imperial Coal Sales Company,* 293 U. S. 15, the intangibles taxed were managed and controlled in Virginia and held subject to *ad valorem* property taxation there. It so happened that the corporation owning the intangibles was a Virginia corporation so that the situs of management and control was the same as the technical domicile. It is significant to note, however, that the decision in that case was not placed

solely upon the ground that the corporation was a Virginia corporation, but, as well, for the reason that the intangibles there involved were managed and controlled within the State of Virginia. It was observed (293 U. S. 19):

> "The money on hand, and the bills and accounts receivable, the excess of which over bills and accounts payable was assessed, had their *situs* in Virginia. Respondent is a domestic corporation with its principal office in that State *where the proceeds of its accounts receivable are collected and deposited in bank.* Such credits and accounts are regarded as situated at the domicile of the creditor and that domicile establishes a basis for taxation." (Italics ours.)

There is nothing in the case to suggest that had the business functions of the Imperial Coal Sales Company been performed in Ohio or in some other state and had nothing been done in Virginia except to perform the technicalities necessary to preserve its corporate existence, such intangibles would have a taxable situs in the State of Virginia.

In the case of *Safe Deposit & Trust Company* v. *Virginia,* 280 U. S. 83, it was held that the taxable situs of certain intangibles was in Maryland where the same were managed and controlled by the Safe Deposit & Trust Company of Baltimore, rather than in Virginia, the place of domicile of the beneficial owners. Of course the trust company held legal title and the trust company was domiciled in Maryland. It may be that the legal ownership constituted a sufficient basis for the determination of the case, nevertheless, the opinion commented upon the fact that the actual presence and control of the intangibles were elsewhere than at the domicile of the beneficiaries. It was observed (280 U. S. 92):

> "Ordinarily this court recognizes that the fiction of mobilia sequuntur personam may be applied in order to determine the situs of intangible personal property for taxation. *Blodgett* v. *Silberman,* 277 U. S. 1, 72 L. ed. 749, 48 Sup. Ct. Rep. 410. But the general rule must yield to established fact of legal ownership, actual presence and control elsewhere and ought not to be applied if so to do would result in inescapable and patent injustice whether through double taxation, or otherwise."

Following which observation reference was made to many of the "business situs" cases to which we have heretofore referred.

The Pertinent Facts with Respect to the Business Activities of Appellant as Stipulated by Counsel

Wheeling Steel Corporation maintains its principal office in Delaware, through the Corporation Service Company (R. 3).

It does not have any individual office building or suite of offices in the State of Delaware (R. 3).

The record does not show the performance of a single executive act in Delaware. Apparently all that is done in Delaware is to maintain there, through the Corporation Service Company, a duplicate stock register and record of all transactions with reference to appellant's capital stock (R. 3).

Even the meetings of stockholders and of directors are not held in Delaware but are held in Wheeling, West Virginia (R. 4).

While the record shows that the principal officers, namely, the chairman of the board, the president, the treasurer, the secretary, and the chief counsel (R. 4), reside at Wheeling, and presumably have their offices

there, it does not appear that any officer resides in or has any business office in the State of Delaware.

The general business offices are at Wheeling (R. 3).

The general books and accounting records are kept at Wheeling (R. 4).

Sales contracts (regardless of the place from which the materials are shipped) are made subject to acceptance or rejection at Wheeling (R. 4).

All invoices are payable at Wheeling (R. 4).

The majority of commercial accounts are paid by checks issued at Wheeling (R. 4).

Payrolls are made up, and payroll checks made and signed at the various plants (R. 4), but drawn (R. 71-72) against moneys sent for the particular purpose from the Wheeling office, and which funds, of course, are but temporarily in the states, other than West Virginia, in which the plants are.

Dividends, when declared, are ordered to be paid at Wheeling (R. 5).

Original stock records are kept in New York (R. 3) and dividends are disbursed from New York (R. 5), but appellant is not even admitted to do business as a foreign corporation in New York (R. 2).

Sales offices are maintained in several states (R. 3), but appellant is not admitted to do business in any of said states except the State of Ohio; and, as above noted, even the sales made through these sales offices are subject to acceptance or rejection at Wheeling (R. 4).

The Ohio Assessment

The record shows (R. 13) that appellant has been assessed in Ohio with $250,133.42 accounts and notes receivable (apparently no money in banks) and that the plan of assessment is:

"In order to determine the amount of accounts receivable of a foreign corporation subject to taxation in Ohio, the Ohio statutes provide that current accounts payable shall be deducted from the total of current accounts receivable and prepaid items, and that the result shall be apportioned in accordance with the ratio of current accounts receivable arising from business transacted within Ohio to the total current accounts receivable. Under these Ohio statutes the Wheeling Steel Corporation *has been assessed as of January 1, 1933, on accounts and notes receivable amounting to $250,133.42,* which amount is included in the total amount of accounts and notes receivable assessed against the Wheeling Steel Corporation by the Assessor of Ohio County and the Tax Commissioner as of January 1, 1933." (R. 13.) (Italics ours.)

It is also stipulated:

"1. That the taxpayer was assessed by the State of Ohio on account of intangibles in the amount only of Two Hundred Fifty Thousand One Hundred Thirty-three Dollars and Forty-two Cents ($250,133.42).

"2. That when the review by the Tax Commissioner of the assessment of taxpayer's intangibles, as made by the Assessor of Ohio County, was made, neither the Assessor nor the State Tax Commissioner was advised that Two Hundred Fifty Thousand One Hundred Thirty-three Dollars and Forty-two Cents ($250,133.42) of such intangibles had been assessed and the tax thereon paid in the State of Ohio." (R. 70.)

Counsel for appellant, referring to the Ohio plan of assessment, say (Br. 27):

> "* * * This deduction of current indebtedness accounts for the fact that intangibles amounting only to $250,133.42 were taxed in Ohio as *at* January 1, 1933, but the formula for determining receivables taxable in Ohio takes into consideration all the accounts receivable arising from business transacted within Ohio. * * *"

Apparently the suggestion is that a much larger sum of accounts receivable was actually assessed in Ohio, but that the net amount was only $250,133.42 by reason of the deduction of current accounts payable.

It is not believed that the record sustains the suggestion contained in the statement of counsel. The record does not show that appellant owed any current accounts payable anywhere, or the amount thereof. Even though the Ohio rule may permit deduction of current indebtedness, nothing in the record shows that there was, in fact, any such deduction. Nothing affirmatively appears in the record indicating that more than $250,133.42 of accounts receivable were returned to the taxing authorities of Ohio. To the contrary, the provision of the stipulation (R. 13) above quoted shows that appellant, "has been assessed as of January 1, 1933, on accounts and notes receivable amounting to $250,133.42." The statement is not that appellant had been assessed in Ohio on accounts and notes receivable in an amount larger than that figure but netting that figure by reason of deductions. Likewise, in the additional stipulation filed after the judgment of the Supreme Court of Appeals of West Virginia it was stipulated (R. 70) that at the time of the assessment of the appellant's intangibles, "neither the Assessor nor the State Tax Commissioner was advised that Two Hundred Fifty Thousand One Hundred Thirty-three Dollars and Forty-two Cents ($250,133.42) *of such intangibles* had been

assessed and the tax thereon paid in the State of Ohio." (Italics ours.)

It is also expressly stipulated (R. 70) that appellant was assessed by the State of Ohio, "on account of intangibles in the amount only of Two Hundred Fifty Thousand One Hundred Thirty-three Dollars and Forty-two Cents ($250,133.42)."

Appellant knew of its return on intangibles to the taxing authorities of the State of Ohio. At the time the additional stipulation was made appellant had knowledge that the Supreme Court of Appeals of West Virginia had indicated that there should be deducted from the intangibles of appellant so much thereof as were taxable in the State of Ohio, and that the case had been remanded by the Supreme Court of Appeals of West Virginia to the Circuit Court of Ohio County, West Virginia, to permit the showing of further deductions from the assessment as corrected by the tax commissioner because of assessments in other states than West Virginia of more than the $250,133.42, if such could be shown (R. 66). Nevertheless, appellant in the stipulation has made no showing that it owed any current accounts payable or that any accounts receivable were reported to or assessed in any way by the State of Ohio, other than the $250,133.42. The words "of such intangibles" refer, of course, to the intangibles which the Assessor of Ohio County, West Virginia, and the State Tax Commissioner of West Virginia had held assessable in the State of West Virginia.

Furthermore, there is nothing in the record indicating that the Ohio assessment was at less than actual value of the accounts receivable reported. Had a larger amount of intangibles been reported to the taxing authorities of Ohio ar appropriate statement would not have been that the taxpayer was assessed by the State of Ohio, "on account of intangibles in the amount of

$250,133.42," but would have been that appellant was assessed in the State of Ohio on account of intangibles (by way of illustration) in the amount of $1,500,000, which, by reason of the deduction of current accounts payable of $1,250,000.00, netted an assessment of $250,000.00 (in round figures).

We have assigned no cross error to the judgment of the Supreme Court of Appeals of West Virginia directing the deduction of $250,133.42 assessed in Ohio, although the only reason assigned for said deduction by the Supreme Court of Appeals of West Virginia was (R. 66), "for the purposes of this opinion, we assume that the claim of our sister state is well founded, and should be deducted from the assessment as corrected by the Tax Commissioner." It is submitted, however, that the record does not show a taxable situs in the State of Ohio, of any of appellant's accounts receivable. We do not concede that the voluntary return of accounts receivable by the appellant to the taxing authorities of Ohio and the payment of taxes thereon, when the record does not show any taxable situs in the State of Ohio, deprives the State of West Virginia of the right to tax all of the intangibles of appellant which the record, we believe, shows to have a taxable situs in West Virginia.

II.

THE STATUTES OF WEST VIRGINIA UNDER WHICH APPELLANT'S INTANGIBLE PROPERTY WAS ASSESSED, AS INTERPRETED BY THE STATE COURTS, ARE NOT IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION WHEN CONSIDERED IN CONNECTION WITH THE STATUTES RELATING TO THE ASSESSMENT OF LIKE PROPERTY OF EITHER NATURAL PERSONS OR PUBLIC UTILITY CORPORATIONS.

Appellant contends that the statutes of West Virginia deny it the equal protection of the laws because, as

interpreted by the Supreme Court of Appeals of West Virginia, they require the assessment of all of appellant's intangibles, while said statutes require the assessment of only such intangibles of individuals as have been derived from business conducted within the State of West Virginia, and while the only intangibles of public utility corporations, particularly railroads, required to be taxed in West Virginia are the intangibles, "held or used" in the State.

Appellant's error results from a failure to consider all of the pertinent statutes.

Section 1, Article 5, Chapter 11 of the Official Code of West Virginia, 1931, as amended by Chapter 40, Acts of the Legislature of West Virginia, Regular Session, 1933, specifies what personal property is taxable in the State of West Virginia. (This statute is set forth in full in the Appendix to appellant's brief, p. 55.) It is observed that it is provided, "all personal property belonging to persons residing in this state, whether such property be in or out of the state," shall be entered on the personal property books, except that, "personal property of all classes * * * belonging to residents of this state, which is actually and permanently located in another state, and by the laws of such other state is subject to taxation and is actually taxed in such other state, shall not be entered on the personal property book, or be taxed in this state." With respect to non-residents, the same section provides, "all personal property *in the state,* though owned by persons residing out of the state, shall be entered in the personal property book."

Thus it appears that the personal property subject to taxation in the State of West Virginia is all personal property in the state. There is no provision that there be taxed any personal property not in the state, of non-

residents, and there is excepted, even with respect to residents, personal property not in the state.[1]

The foregoing statute is predicated upon Section 1, Article X of the Constitution of West Virginia which is set forth in full in Appendix to appellant's brief, p. 49, and which, in so far as pertinent herein, provides, "All property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law." That intangibles are included within this provision is manifest from their specific mention in the classification for purposes of taxation made by said section.

This provision of the Constitution, and the statute, Section 1, Article 5, Chapter 11 of the Code, as amended as aforesaid, define and specify the property subject to taxation by the State of West Virginia, including intangibles, to be property which is in the state. The statute clearly recognizes the business situs principle with respect both to property of residents when such property is not in West Virginia and to property of non-residents when such property is within the State of West Virginia.

That the word "persons" mentioned in said Section 1, Article 5, Chapter 11, includes corporations is clear from the provisions of Section 10, Article 2, Chapter 2 of the Official Code, which provides:

> "The following rules shall be observed in the construction of statutes, unless a different intent

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[1]It is not believed that the condition of the exception of property permanently located in another state, of residents, that the same shall actually be taxed in another state is material. If such property is actually and permanently located in another state, then it does not have a taxable situs in West Virginia and it is not taxable there, whether or not it be taxed in another state. It may be that the said provision was originally designed as a relinquishment of the principle of *mobilia sequuntur personam* with respect to intangible property of residents only when such property was actually taxed elsewhere.

on the part of the legislature be apparent from the context: * * * .

"The word 'person' or 'whoever' shall include corporations, societies, associations and partnerships, if not restricted by the context; * * *."

This is further shown by the provisions of Section 6, Article 5, Chapter 11 of the Official Code relating to the deduction of indebtedness from the assessment of intangibles. This section has been repealed by omission from Chapter 40, Acts of the Legislature of West Virginia, Regular Session, 1933, but is informative here inasmuch as it uses the word "persons" and does not use the word "corporations," while, for many years prior to its repeal, corporations and individuals alike availed themselves of the deductions therein provided for.

Chapter 38, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933, amending Section 12, Article 3, Chapter 11 of the Code of West Virginia, prescribes the report required to be made to the assessor by a corporation (this statute is set forth in full in Appendix to appellant's brief, p. 50). Among the items required to be reported are:

"* * *

"(c) the amount of money on hand or on deposit anywhere subject to its check or draft, on the first day of the assessment year; (d) the amount of credits and investments other than its own capital stock held by it on said date, with their true and actual value; * * *."

Section 13, Article 3, Chapter 11 of the Official Code (this statute is set forth in full in Appendix to appellant's brief, p. 52) provides what property of the corpo-

ration shall be assessed, that being, "all the property of such corporation liable to taxation." True, said section provides, "all property mentioned in items (c) and (d) shall, together with their valuation, be entered in the personal property book of the county, * * *" but obviously, this reference to all property mentioned in said items (c) and (d) is clarified by the preceding provision of the same section, that there is taxable only "all the property of such corporation liable to taxation," which has in turn been specified by said Section 1, Article 5, Chapter 11 of the Code, as amended as aforesaid, and which is limited to property within the state. In fact, in Section 12, Article 3, Chapter 11, in providing for the report, it is clear that the provisions thereof relate only to property subject to taxation in this state, since it is provided, "Each incorporated company foreign or domestic having its principal office or chief place of business in this State, *or owning property subject to taxation in this State,* * * *" shall make a report, etc. (Italics ours.)

This is the interpretation given said Section 13, Article 3, Chapter 11 by the Supreme Court of Appeals of West Virginia in its opinion in this case (R. 65). It is believed that the interpretation of the statute by the Supreme Court of Appeals of West Virginia is conclusive. (See *Swiss Oil Corporation* v. *Shanks,* 273 U. S. 407; *Quong Ham Wah Company* v. *Industrial Accident Commission,* 255 U. S. 445; *Supreme Lodge* v. *Meyer,* 265 U. S. 30; *Brown-Forman Company* v. *Kentucky,* 217 U. S. 563; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 105.)

Section 15, Article 3, Chapter 11 of the Code of West Virginia, as amended by Chapter 40, Acts of the Legislature of West Virginia, Regular Session, 1933, provides for the assessment of property used in business by an

individual (this statute is set forth in full in Appendix to appellant's brief, p. 53), and that particular section refers to money derived from such trade or business and credits arising from such business. It is clear, however, that the purpose of this statute is to define the place within the State at which such property used in business by a natural person shall be taxed, just as does the provision of said Section 13, Article 3, Chapter 11 relating to the entry of corporate property provide, "If a company have branches, each branch shall be assessed separately in the county and magisterial district where its principal office for transacting its financial concerns is located; * * *." But there are other statutes relating to the assessment of the property of individuals. Section 2, Article 5, Chapter 40 of the Acts of the Legislature of West Virginia, Regular Session, 1933 (set forth in full in Appendix herewith, page 3), provides that the assessor shall enter the names of owners of personal property showing separately the value of, "(3) All money, notes, bonds, bills and accounts receivable, stocks and any other intangible personal property; * * *."

Section 4, Article 5, Chapter 40 of said Acts of 1933, Regular Session, provides:

> "Every person required by law to list personal property for taxation shall list the tangible personal property in the magisterial district wherein it is on the first day of the assessment year * * *; and he shall list for taxation in the magisterial district in which he resides the money, notes, bonds, bills and accounts receivable, stocks and other intangible personal property subject to taxation belonging to himself or under his charge or control, whether the same, or the evidence thereof be in or out of the state; but capital, money and intangible property (except real estate

> and chattels real) employed in any trade or business (other than agriculture) belonging to a company whether it is incorporated or not, or to an individual, shall be assessed for taxation in the magisterial district wherein the principal office for the transaction of the financial concerns pertaining to such trade or business is located; or, if there be no such office, then in the district where the operations are carried on. * * *."

Thus, it is clear that said Section 4, Article 5, Chapter 40 requires all of the property within the state owned by an individual to be taxed and that that which is not identified with a business shall be taxed in the magisterial district in which the individual owner resides, while, as provided by Section 15, Article 3, Chapter 11, that which is used by the individual in trade or business is assessed in the magisterial district in which the trade or business is conducted.

Appellant has referred to the statute requiring reports by corporations (Sec. 12, Art. 3, Chapter 11). Section 2, Article 3, Chapter 11 of the Official Code provides for the canvass by the assessor and the giving of information by the person of all personal property of which the person was the owner on the first day of January of the current year; and the taxpayer is required to make report under oath in language substantially the same as the oath required to be made on behalf of the corporation (Section 12, Article 3, Chapter 11, as shown in Appendix to appellant's brief, p. 51). Section 4, Article 3, Chapter 11, providing the oath, is set forth in full in the Appendix hereto, page 2.

It is believed that an examination of the several statutes herein referred to and set forth in the Appendix herewith, in conjunction with those set forth in the Appendix to appellant's brief, will show that there is no

discrimination between the assessment of intangibles of corporations, either foreign or domestic, and natural persons.

It is further contended by counsel for appellant that there is a discrimination between business corporations, such as the appellant, and public utility corporations, and by way of illustration appellant sets forth (Appendix, p. 59) the provisions of Section 2, Article 6, Chapter 11 of the Code of West Virginia relating to railroads, and points out that a railroad corporation is required to report, "(f) personal property, of every kind whatsoever, including money, credits and investments *wholly held or used in this State*, * * *." (Italics ours.)

The words "held or used in this State" are merely a designation that such property and credits are to be reported only when they are in the state. It is just another way of saying that the railroads shall report their money and accounts which have a situs in the State of West Virginia. The record here shows that the moneys and accounts receivable of appellant are held and used in the State of West Virginia. If such were not so, they would have no taxable situs in the state. The words "held or used" have the same purpose in said Section 2, Article 6, Chapter 11 that the words "in the state" as used in Section 1, Article 5, Chapter 40 of the Acts of the West Virginia Legislature, Regular Session, 1933, have in defining what personal property is taxable in the State of West Virginia.

The requirement that a business corporation report all of its intangibles, wherever held, means, when considered together with the other statutes herein referred to, all intangible property subject to taxation in West Virginia or having a taxable situs therein. Even should other intangibles be reported, they are not assessed and taxed because the entry of the assess[illegible] Section 13, Article 3,

Chapter 11) is only of the property "liable to taxation." Section 1, Article 5, Chapter 11 shows clearly what property is liable to taxation.

Appellant has shown no facts of discrimination with respect to it and any other taxpayer, either business corporation, public utility corporation, or natural person. It is believed that the pertinent statutes plainly show a constant purpose and intent to tax all intangibles within the state and to tax no intangibles which are without the state. However, even though the statute were susceptible of an interpretation, which, if adopted, would result in discrimination against appellant, no showing of any administrative action which is discriminatory in fact is presented.

It is believed that if appellant would rely upon discrimination or the denial of the equal protection of the laws it would be incumbent upon appellant to show such discrimination or denial by the record in this case. This, appellant has not done, we believe, because it cannot be done, since the tax laws of West Virginia as administered, as well as enacted, are not discriminatory, but treat all alike, persons and corporations, with respect to *ad valorem* property taxation, and thus extend fully the equal protection of laws to all persons.

REPLY TO MISCELLANEOUS STATEMENTS OF APPELLANT'S BRIEF AND COMMENT UPON APPELLANT'S AUTHORITIES.

It is believed that the foregoing portions of appellee's brief discussing the matter of business situs and showing the absence of inequality from the statutes of West Virginia relating to property taxes, constitute a reply to the two principal contentions of appellant, namely, that the intangibles of appellant have no taxable situs in West Virginia and that the West Virginia *ad valorem*

property tax statutes deny appellant the equal protection of the laws guaranteed to the appellant by the Fourteenth Amendment to the Constitution of the United States. It is hoped, however, that brief comment upon some of the statements of appellant's brief may serve to further clarify the presentation of this case.

The Interpretation of Section 12, Article 3, Chapter 11 of the Code of West Virginia

In appellant's brief (pp. 40 ff.) it is contended that Sections 12 and 13 of Article 3, Chapter 11 of the Code of West Virginia require the taxation of all of the intangibles of a non-resident corporation doing business in the State of West Virginia, wherever such intangibles may be situated. We believe that all of the intangibles of appellant are taxable in West Virginia, not because of any confusion in the statutes of West Virginia but because such intangibles of appellant have a taxable situs in West Virginia. We do not contend that the statutes of West Virginia require the taxation of all intangibles of every foreign corporation doing business in the State of West Virginia, merely because some business is done in the State of West Virginia.

We have heretofore pointed out that the decision of the Supreme Court of Appeals of West Virginia in this case was that said Sections 12 and 13 provide for the taxation by the State of West Virginia of only such intangibles of non-resident corporations as are within the State of West Virginia. From appellant's brief (pp. 6-7) it clearly appears that appellant upon the advice of counsel purported to report to the assessor of Ohio County, West Virginia, originally, only its intangibles taxable in West Virginia. Thus, it appears that appellant understood said statutes to mean just what we here contend that they mean and just what the Supreme

Court of Appeals of West Virginia has held that they mean. The difference in the positions of appellant and appellees is not in the interpretation of these statutes but is in the determination of what intangible property is within the State of West Virginia—meaning what intangible property has a taxable situs in the state.

In this connection it is significant to note that the Constitution of Louisiana, from which state several of the "business situs" cases arose, provided: "All property shall be assessed in proportion to its value" *(State Board of Assessors* v. *Comptoir National D'Escompte de Paris,* 191 U. S. 388, 404), which is almost literally the same language, in part, found in Section 1, Article X, Constitution of West Virginia (Appendix, Appellant's Brief, p. 49), and, in the case just referred to, as well as in others, this provision was referred to as having significance in determining that the intangible property in those cases involved was taxable in the State of Louisiana.

Allocation of Intangibles and the Case of Union Refrigerator Transit Company v. Kentucky, 199 U. S. 194

Counsel for appellant seem to rely upon the case of *Union Refrigerator Transit Company* v. *Kentucky, supra,* in contending that the intangible property of appellant should be apportioned among the several states in which it does business, according to the assessed value of real estate and tangible personal property in said states.

The *Union Refrigerator* case involved tangible personal property, railroad cars, and did not hold that the personal property actually within a state should be allocated for purposes of taxation between the several states in which business was done, as is contended by appellant here. No one car was in the State of Kentucky all the time, while all of the cars were actually in many

states a part of the time. This decision is usually accepted as one approving an allocation of railroad rolling stock upon some reasonable basis, the basis of a percentage of gross receipts (used by the Kentucky court in the *Union Refrigerator* case), a basis of miles operated within the state as compared with total miles operated, or other principle, though this case approved no particular method.

This case rejected the contention that all of the two thousand cars were in Kentucky, following the principle *mobilia sequuntur personam,* merely because the Union Refrigerator Company was a Kentucky corporation. Here, there is no showing by the record that the money on deposit and accounts receivable of appellant have not been in the State of West Virginia, as we contend under the commercial domicile principle, all the time, and were not in West Virginia on the tax assessment date.

Appellant's Real Contention

Appellant says (Br. 15), "The use of tangible property, both real and personal, in business, creates intangible property, and it is submitted that the only fair rule for the taxation of property in states other than the state of the domicile is a rule which allocates intangibles on the basis of tangible property owned and used in production of material for sale. Such a rule will permit each state in which tangible property is located and operated for profit to tax a fair proportion of the intangible property created within its borders." It is believed that this statement in reality accurately presents appellant's position. With this position we do not agree. It is believed that the error of appellant's position results from a misconception of the nature of *ad valorem* property taxation. *Ad valorem* taxation is predicated upon the existence of property subject to taxation within the taxing state, not upon the source from which such property may have

come or where, in the case of intangible property, it may ultimately be expended. If the property is not in the State of West Virginia it is not subject to taxation by the State of West Virginia, even though it may have arisen from West Virginia. Likewise, if the property is in West Virginia it is taxable in West Virginia, even though it may have arisen elsewhere. Property can neither be taken out of the State of West Virginia nor brought into the State of West Virginia by the attempted application of any supposed rule of equitable allocation.

Counsel for appellant refer to the supposititious situation of two Delaware corporations doing business in West Virginia and other states, one having executive offices in West Virginia and one having executive offices in another state, and ask whether the Fourteenth Amendment would permit the taxation of intangible property of one in West Virginia and not the other. Our position is that the intangible property held in West Virginia by the one is taxable in West Virginia while the intangible personal property held by the other in another state is not taxable by West Virginia, even though such intangibles may have arisen from business or manufacturing activities conducted beyond the territorial limits of either state. If the general business offices of Wheeling Steel Corporation, operating in the manner shown by this record in Wheeling, were not in Wheeling, but were in Ohio, we have no hesitation in saying that the intangibles would not be taxable in West Virginia.

Likewise, we say that, with respect to intangibles of the character here involved, the transfer of taxable situs for *ad valorem* property taxation would be effected from New York to New Jersey upon the illustration of the case of *Adams Express Company* v. *Ohio State Auditor*, (166 U. S. 185 at 224 not 185 U. S. 224), quoted in appellant's brief (Br. p. 17). The difference between this case and the *Adams Express Company* case is that in the *Adams*

Express Company case the intangible property there under consideration was not money and accounts receivable, which the decision recognizes might have a special situs, (166 U. S. 222) but the intangible value of franchises, contracts, privileges, and the like, (166 U. S. 223) represented by the difference between the actual investment of the express company in tangible property and its going-concern value. The case held that such intangible value was assessable, but, of course, that intangible value was so identified and non-separable from the tangible property of the express company as to require its distribution upon substantially the same basis as was its tangible personal property actually distributed by actual presence among the several states in which the company operated, because such franchises, privileges and contracts were actually had, made, performed, controlled and managed in the several states. This case did not involve money in bank or accounts receivable, the situs of which is clearly separable from the real estate and tangible personal property from which it may have been derived.

We have heretofore pointed out that the case of *Virginia* v. *Imperial Coal Sales Co.* (293 U. S. 15, 20) dispelled the idea that intangible property of the kind here involved can be taxed only in conjunction with the taxation of real estate or tangible personal property.

Some Cases Distinguished

The case of *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123, involves an income tax, not an *ad valorem* property tax upon intangibles. The income tax is imposed upon the earning of money as distinguished from the ownership thereof. Obviously, all the income considered in the *Hans Rees' Sons* case was not earned in North Carolina and North Carolina could not impose an income tax thereon. This case did not consider the presence of

such intangibles so earned with respect to the determination of the taxable situs for purposes of *ad valorem* property taxation.

The case of *Looney* v. *Crane Co.*, 245 U. S. 178, did not involve an *ad valorem* property tax but a franchise or privilege tax based not upon activities within the State of Texas but upon capital, surplus, and undivided profits not subject in any way to the jurisdiction of the State of Texas.

The case of *Alpha Portland Cement Company* v. *Massachusetts*, 268 U. S. 203, involved a Massachusetts privilege tax upon the cement company, the business of which, in so far as the State of Massachusetts was concerned, was exclusively in interstate commerce. It was simply held that said tax was a burden upon interstate commerce.

In the case of *Baldwin* v. *Missouri*, 281 U. S. 586, it was expressly stated (281 U. S. 590), "The record discloses nothing tending to show that the personal property had been given a business situs in that state."

In the case of *American Barge Line Company* v. *Board* (Ky.), 55 S. W. (2d) 416, there was an attempt on the part of Kentucky to assess not only the accounts receivable of the American Barge Line but also the tangible personal property. The business of the American Barge Line was referred to as a "far flung business." While the office of the company at Louisville seemed to be the chief executive office, all of the executive functions of the company were not managed there, as appears to be true in the case at bar, but the company had other offices at Pittsburgh, Cincinnati, Louisville, Memphis, New Orleans, and Chicago, where important executive functions were also performed. The decision recognizes the principle of the business situs but simply held that it had not been established in that case.

If it be considered that the decision was on the basis that all of the intangibles were taxable in Delaware, the state of incorporation, we do not believe that the opinion is sound in principle or in keeping with the "business situs" decisions of this Court.

In the case of *Frick* v. *Pennsylvania,* 268 U. S. 473, it was held that Pennsylvania could not impose an inheritance tax upon the estate of the decedent domiciled in Pennsylvania in so far as it pertained to tangible personal property actually located in another state and that such property located in another state could not be considered in determining the rate to be imposed upon the property actually located in Pennsylvania.

The case of *Farmers Loan & Trust Company* v. *Minnesota,* 280 U. S. 204, overruled the case of *Blackstone* v. *Miller,* 188 U. S. 189, which had held that the situs of notes and accounts receivable was at the domicile of the debtor, and held that in the absence of the establishment of a business situs, the situs of such intangible property was at the domicile of the creditor.

In this connection it may be noted that while counsel for appellant repeatedly refer to the fact that the case of *Blackstone* v. *Miller* was overruled by the *Farmers Loan & Trust Company* case, apparently in making its original report to the assessor of Ohio County, West Virginia (Br. 7), acting upon the advice of counsel (Br. 6), appellant relied upon *Blackstone* v. *Miller* in reporting for assessment in West Virginia only the accounts and notes receivable in West Virginia owed to appellant by residents of West Virginia.

Appellant's position in this regard would seem to be rather inconsistent.

Other cases relied upon by appellant are, we believe, sufficiently considered elsewhere herein.

The Business Situs Cases

At pages 28-32 of appellant's brief, counsel comment upon the business situs cases decided by this Court, and emphasis is laid upon the fact that in *New Orleans* v. *Stempel*, 175 U. S. 309, and *State Board of Assessors* v. *Comptoir National D'Escompte*, 191 U. S. 388, the physical presence of the notes in Louisiana was the basis of the decisions. But counsel further point out that in the cases of *Bristol* v. *Washington County*, 177 U. S. 133, and *Metropolitan Life Insurance Company* v. *New Orleans*, 205 U. S. 395, the evidences of the indebtedness were kept in New York, except when their presence was required in Minnesota and Louisiana, respectively. In several of these cases *Blackstone* v. *Miller* was cited. We believe, however, that the real basis of the decision in these several cases was not the principle of *Blackstone* v. *Miller* that the situs of such intangibles was at the domicile of the debtor, or that the notes had a physical presence in the taxing states, but that as stated in *Liverpool L. & G. Insurance Company* v. *Board of Assessors:* "The legal fiction expressed in the maxim *mobilia sequuntur personam* yields to the fact of actual *control elsewhere.*" (Italics ours), as appears from page 30 of appellant's brief.

Allocation and Division of Governmental Powers

At pages 32-40 of brief counsel for appellant make further reference to the matter of the allocation of intangibles with respect to the states from which such intangibles have been earned or derived. As hereinbefore stated, we do not believe the question of allocation is involved in this case, it being one relating to *ad valorem* property taxation and not relating to an income or privilege tax.

Here, we do not have an attempt to delegate the legislative power of prescribing some plan of allocation, because allocation is not involved. All that is here involved is the administrative problem of determining what property is in West Virginia. Section 1, Article 5, Chapter 11 of the Code of West Virginia hereinabove referred to, says that all such property in West Virginia shall be taxed. It is not believed that there is thereby vested in the assessor or the tax commissioner any legislative power but purely an administrative power. True, some administrative discretion must be exercised, but that is true in the performance of practically every executive act. It is not believed that the cases of *Panama Refining Company* v. *Ryan*, 293 U. S. 388, and *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, are any authority for the proposition that vesting in an administrative officer the duty of determining what property is within the State of West Virginia constitutes any delegation of legislative power. To the contrary, in *Panama Refining Company* v. *Ryan*, 293 U. S. 388, at page 421, it was observed:

> "* * * Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits *and the determination of facts* to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative

> power which in many circumstances calling for its exertion would be but a futility. * * *." (Italics ours.)

It is believed that the ascertainment of property subject to taxation is universally recognized as a mere administrative function within the observation just quoted.

In the Virginia case of *Commonwealth* v. *P. Lorillard Company, Inc.*, 105 S. E. 683, an income tax was involved with no legislative standard for determining what income was derived through Virginia activities with respect to a company carrying on business in many states. This was, in truth, a legislative failure.

The case of *Southern Express Company* v. *Patterson* (Tenn.), 123 S. W. 353, did not involve the jurisdiction of the State of Tennessee to tax, but an absence of plan for assessing a tax upon intangibles where a corporation did business in more than one county within the State of Tennessee. Our statutes (Section 13, Article 3, Chapter 11 of the Code of West Virginia with respect to corporations, and Section 15, Article 3, Chapter 11 of the Code of West Virginia with respect to natural persons, and Section 4, Article 5, Chapter 40, Acts 1933, Regular Session, relating to both) make provision for assessments in the counties and several magisterial districts.

The case of *State* v. *Humble Pipe Line Company* (Tex.), 247 S. W. 1082, involved a privilege tax on pipe lines, proportioned with respect to the entire business of the corporation upon the length of line within the State of Texas as compared with the total length of the line. It was held that this was not a proper basis since the ability of the State of Texas to tax was not properly predicated upon the length of the line in Texas but upon the character of commerce transported, whether that be intra-state or interstate. Obviously, a line located en-

tirely within the State of Texas but connected with lines of other companies running in other states might be used entirely for interstate commerce and not at all for intrastate commerce. A privilege tax upon such business would be a burden upon interstate commerce. An *ad valorem* property tax was not involved.

The Virginia case of *Sussex County* v. *Jarratt*, 106 S. E. 384, merely involved an assessment of shares of stock in a bank which assessment did not follow the statutory procedure provided therefor, and, apparently, has no relation to the case at bar other than to state the general proposition that tax statutes are construed liberally in favor of the taxpayer.

Commonwealth v. *Wilson* (Virginia), 126 S. E. 220, merely related to the taxation of a life estate and the remainder in real estate and held that there could be no allocation between the life tenant and the remainderman in the absence of a statute providing therefor.

Appellant's Illustration of the Ohio Resident Engaging in Business in West Virginia

At pages 42-43 of the brief, appellant suggested that a resident of Ohio doing business both in Wheeling, West Virginia, and in Ohio, but with his principal office in Wheeling, would not pay any tax in West Virginia upon the money which he may have deposited in banks in Pennsylvania derived from goods manufactured and sold in Ohio; nor would he pay tax in West Virginia upon the credits arising from his Ohio business, even though such business was directed from his Wheeling office. We cannot agree with the conclusions of counsel for appellant on this illustration. Section 1, Article 5, Chapter 11 of the Code of West Virginia, imposes a tax upon the intangible property of a non-resident when such property is actually in West Virginia. If the non-resident

conducted all of his business affairs in West Virginia in the manner in which the Wheeling Steel Corporation here conducts its business, undoubtedly, the intangible property of the individual would acquire in West Virginia a business situs just as well as has the intangible property of the Wheeling Steel Corporation acquired a business situs in West Virginia. Said Section 1, Article 5 of Chapter 40 of the Acts of 1933, amending said section and article of Chapter 11 of the Code of West Virginia, in defining what property shall be taxed, includes, "all personal property in the State, though owned by persons residing out of the State." It is believed that this provision would cover the illustration of counsel for appellant.

Appellant's Cases on Unreasonable Classification for Purposes of Taxation

Believing that we have heretofore shown by a consideration of the statutes of West Virginia relating to the taxation of intangible personal property that no question of classification is here involved, we do not comment upon the cases cited by counsel for appellant holding various classifications unreasonable, such as *Quaker City Cab Company* v. *Pennsylvania*, 277 U. S. 389; *Royster Guano Company* v. *Virginia*, 253 U. S. 412, and other. We readily concede the principles for which these cases stand.

CONCLUSION

In conclusion, it is respectfully submitted:

(1) That the money in bank and accounts receivable of Wheeling Steel Corporation here involved have a taxable situs in the State of West Virginia;

(2) That the statutes of West Virginia, defining what intangible property is liable to taxation in West Virginia and prescribing the methods for the assessment of such intangible property, are not discriminatory as against appellant or other corporations similarly situated; but extend the equal protection of the laws to all persons, corporations and natural persons as well; and are not violative of the Fourteenth Amendment to the Federal Constitution; and

(3) That the judgment appealed from should be affirmed.

Respectfully submitted,

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